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KYSC1975-SC-1050-05

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REPLY BRIEF

539 SW 2d 303

SUPREME COURT OF KENTUCKY

NO. 75-1050

COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION, et al., . APPELLANTS,

VS:

MORRIS STEPHENS, et al, APPELLEES.

APPEAL FROM THE FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JUDGE
CONSOLIDATED ACTIONS NO. 75-1050,
NO. 75-1099 and NO. 75-1177

RESPONSE BRIEF FOR APPELLEES TO AMICUS CURIAE BRIEF OF CITIZENS LEAGUE TO PROTECT SURFACE RIGHTS

FILED

JUN 17 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

HON. HOMER W. RAMSEY
Whitley City, Kentucky 42653

and

HON. J. B. JOHNSON, SR.
Williamsburg, Kentucky 40769

Attorneys for Appellees

The undersigned hereby certifies that the herein Brief by Appellees, in response to Amicus Curiae Brief of Citizen's League to Protect the Surface Rights, Inc., has been mailed to Hon. Squire N. Williams, Circuit Judge, Franklin County Court House, Frankfort, Kentucky 40601; to Hon. Robert Stevens, Office of the Attorney General, Capitol Building, Frankfort, Kentucky 40601; to Hon. Ben Fowler, Stites, McElwain & Fowler, Frankfort, Kentucky 40601 and to Hon Ronald D. Ray, Greenebaum, Doll, Mathews & Boone, 3300 First National Tower, Louisville, Kentucky 40202, all on this 17 day of June, 1976.


Of Counsel for Appellees *PJD*

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SUPREME COURT OF KENTUCKY

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NO. 75-1099 and NO. 75-1177**

**RESPONSE BRIEF FOR APPELLEES
TO AMICUS CURIAE BRIEF OF CITIZENS LEAGUE
TO PROTECT SURFACE RIGHTS**

MAY IT PLEASE THE COURT:

PURPOSE

We now ask this Court to permit us to file this response to Amicus Curiae Brief, filed May 28, 1976, by Citizens League to Protect the Surface Rights, Inc., under Rule 1.245(b).

We intend to show that these people, if successful, would *destroy* the State, Federal, and

Statutory Provisions of protection to citizens to "*own and protect property.*"* It would reverse every case decided by this Court since it was admitted to the Union. It would repeal the acts of the Kentucky Legislature to protect its citizens. It would say that the Kentucky Legislature did not know what it was doing and rewrite 1972 Acts, KRS 146.200-990, and say we — not the Legislature — know best what to do.

In fact, the name of the organization, "Citizens League to Protect the Surface Rights" should be changed to "*Citizens League to Destroy Property Owners' Rights.*" Any organization is known by what it does, or tries to do — not by what it proclaims.

*All italics our emphasis.

ARGUMENT-CONSTITUTIONAL PROTECTION

A. The Brief *Amicus Curiae* completely ignores the Constitutional, Federal and State and the statutory protections of the Wild Rivers Act. Let's review these protections:

1. *Kentucky Constitution, Section I. Inherent and Inalienable Rights.* "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned; (5) The right of acquiring and protecting property."
2. *Kentucky Constitution, Section 2,* says: "Absolute and arbitrary power over the *lives, liberty and property* of free men exists nowhere in a republic, not even in the largest majority."
3. *Kentucky Constitution, Section 3,* provides: "All men when they form a social compact are equal and no exclusive grant shall be made to any man or set of men."
4. *Kentucky Constitution, Section 4,* reads: "All power is *inherent* in the people, and all free governments are founded on their authority". Then it says: "The people have the right to alter, reform or abolish their government in such a manner as they may deem proper."

It will be observed that the people — not a voluntary group as we have, *Amicus Curiae* — have the right to alter, reform or abolish. Of course, that takes a constitutional act.

5. *Kentucky Constitution, Section 13* Provides:
 “. . . . nor shall any man’s property be *taken* or *applied* to public use without just compensation being made previously to him.”
6. *Kentucky Constitution, Section 242*, authorized a taking for public purposes, then says:
 “. . . shall make just compensation for the property *taken, injured* or *destroyed* by them; which compensation *shall be paid before* such taking, or paid or secured, at the election of such corporation or individual *before such injury destruction.*”

It is worthy of note and emphasis that Section 13, Kentucky Constitution says the compensation must be made “previously”. Section 242, Kentucky Constitution, twice uses the word “*before*”. So we have two sections of the Kentucky Constitution mandating compensation for property “*injured*” or “*taken*” *before the act of taking*.

U. S. Constitution, XIV — Section I provides:
 “. . . nor shall any state deprive any person of his life, liberty or *property* without due process of law.”

Comments:

It is passing strange that the Amicus Curiae Brief no where mentions these vital, provisions of the constitutional protection guaranteed *property owners*. The right to *acquire* property and to *protect* it is specifically given in Kentucky Constitution, Section I (5), Kentucky Constitution Bill of Rights.

Then the capstone is put into the Bill of Rights by Section 26, Kentucky Constitution. It says:

"To guard against the transgressions of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of the government, and shall forever remain inviolate; and all laws to the contrary thereto, or contrary to this constitution, shall be void."

Could the protection be stated in plainer words? We doubt it.

B. Statutory Protection in "Wild Rivers" Act.

The "Wild Rivers" mandate compensation for "any interest" taken.

We are simply amazed that counsel writing Amicus Curiae brief, as they do, (Brief p. 1) say: "It is our hope that this Brief will be read as the one that best represents the people of Kentucky, for whom the Wild Rivers was established."

Then they contend (p. 4) that the act's intent is not clearly shown and is ambiguous and that language is specifically mandating compensation really intends just the opposite. They say language directing compensation is "irrelevant" or "surplusage".

Now, let's see what the "Wild Rivers" Act says:

1. KRS 146.220 says: ". . . it is not the *intent* of KRS 146-200-350 to require or authorize *acquisition* of all lands or interest in land within the exterior boundaries . . ."

In other words, "Wild Rivers" said, "We do not require you to take that you do not need." Here taken by injunction *all within 2500 feet of the middle of the river.*

2. KRS 146.230 says they shall: "*acquire* all the land within the area to the full extent *necessary.*"

Now, they must have felt it was "necessary" to take 2500 feet for that is what they did take by the injunction.

3. KRS 146.281 says that they are: "*authorized and empowered to acquire by purchase, exercise by right of eminent domain, grant, gift, devise or otherwise, the fee simple title to a scenic easement or any acceptable lesser interest in any lands, and by lease or conveyance, contract for the right to use and occupy the lands.*"

Then it says: "**NOTHING IN KRS 146.200 to 146.350 SHALL BE CONSTRUED TO DEPRIVE THE LANDOWNER OF HIS PROP-**

ERTY OR ANY RIGHT THEREIN WITHOUT JUST COMPENSATION."

4. KRS 146.280 (2) provides: "*The Commissioner shall not obtain an easement if the land owner objects thereto, but in such case must obtain fee title with compensation to the landowner.*"

So it is obvious that the Legislature gave to the State alternate ways to *acquire* the property. It uses the word "acquire" four times and the words *lease, contract, grant, gift, devise* and *otherwise* (that, we think means negotiation) but it is careful not to try to do it without complying with the Constitution, *fully compensate the owner for any interest.*

The Legislature said *acquire* and *pay* many times in the 1972 act. It followed the Constitution, the statutes and the Court decisions. We find that by this intervention there is a group that in the name of police power, wants us to throw the Constitutional protections away and say the Legislature did not mean what it plainly said. No where in the act does it say you may take without paying. It does provide that they might take it by gift. That was unnecessary, of course.

Then refer to Senate Bill 309, Acts of 1976, amending the act of 1972. While it has no application in this case, it clearly shows by the amendment that the Legislature recognized the state would have to compensate property owners under the 1972 act and that looking to the future they

would delete that much. So the language directing compensation is in brackets in the 1976 act. They deleted compensation. That is just what they cannot do under the Constitution. That Act, 1976, is void on its face, void ab initio. If they want to get property without paying for it, they will have to write a new Kentucky Constitution. See Section I (5), 13, 242, supra, the 1976 Act. It is not important here because it can't have retroactive effect on vested rights.

The Kentucky Constitutional Provisions do not authorize voluntary groups to speak where it speaks. They have no right to deny a right to own and protect property guaranteed by the Constitution.

C. Police power is subordinate to constitutional protections.

We have heretofore discussed this question. It is well settled that when police power conflicts with constitutional protections police power must yield: *Pa. Coal Co. v. Mahan*, 43 S.Ct. 158; 16 C.J.S. Sec. 174, 196, 209 and 284.

OTHER CASES CITED: *So. Ry. v. Consumers Fuel*, 262 S.W. 581, it held that "no emergency, however great, supersedes compensation before taking."

Lovell v. Osborne Mining Co., Ky. 395 S.W.2d 596, says: "Courts are not at liberty to change the law as written."

City of Covington v. Greenburg, 47 S.W.2d 723, 242 Ky. 798 holds: "The Legislature cannot provide of a taking for public use without payment of compensation, Ky. Const. Section 242."

Gatewood v. Matthews, Ky., 403 S.W.2d 711, is a case every lawyer should read and reverently cherish. It is a bedrock decision. We quote a few lines:

"The Bill of Rights has been purposely set aside as supreme and inviolate because it represents those things that are basic and eternal. All other matters transitory and subject to change."

D. Foreign Citations Are Not Controlling.

Most of the Brief (Brief is not the proper word to describe this 146 page document) is used in citing Federal or other state cases. The 81 page photo exhibits are such fine print that this violates Rule 1.200 of this Court for briefing. The writer of this brief simply can't read them (It should be stricken, but we are not asking that it be stricken because that would cause further delay and more useless expense on the Appalachian Research and Defense

Fund, Inc.) But the foreign cases are not at all pertinent to the constitutional provisions in Kentucky and the "Wild Rivers" Act.

This property is located in Kentucky. All the parties, owners and the Commonwealth representatives are in Kentucky. So it must be tried and decided under Kentucky law.

Constitutional protections like a solid building, are not destroyed in one stroke. But take out one protection then injury comes to the whole structure and, by a process of attrition, the whole is destroyed.

It would be useless to have a right to "*acquire*" property if the owner could not "*protect*" it. Such a rule would stagnate all ambition — a hollow life, indeed.

CONCLUSION

We shall not burden this court with further comments or citations. The constitutional protections and "Wild Rivers" Act are so clear and well established that property owners are protected from taking their property, "or any interest therein" that it is vain to contend otherwise.

Respectfully submitted,

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